No. 98-124

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In The

Supreme Court of the United States

October Term, 1997

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY, A Joint Powers Agency,

Petitioner,

v.

CITY OF BURBANK, CALIFORNIA
A Municipal Corporation,

JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of Transportation of the State of California,

STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT CITY OF BURBANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a political subdivision of a state, which already has pursued to conclusion a claim in state court that a state statute is preempted by federal law, also has standing to pursue the identical claim in federal court against the state and another political subdivision?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Burbank-Glendale-Pasadena Airport Authority was the Plaintiff in the United States District Court for the Central District of California, and was the Appellant in the United States Court of Appeals for the Ninth Circuit.

Respondents City of Burbank and James van Loben Sels were defendants in the United States District Court for the Central District of California, and were Appellees in the United States Court of Appeals for the Ninth Circuit.

Respondent State of California intervened as a defendant in the United States District Court for the Central District of California, and was an Appellee in the United States Court of Appeals for the Ninth Circuit.[1]

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[1] Hereinafter, this brief refers to Respondents James van Loben Sels and the State of California collectively as the "State".

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The Petition for a Writ of Certiorari accurately reflects the opinion of the United States Court of Appeals for the Ninth Circuit and the order of the District Court for the Central District of California, which are located in Appendices A and B to the Petition. Respondent City of Burbank notes that the order of the Ninth Circuit denying Appellant's petition for rehearing, which is set forth in Appendix C to the Petition, also rejected Appellant's suggestion for rehearing en banc.

JURISDICTIONAL STATEMENT

The Petition for a Writ of Certiorari accurately reflects the basis for jurisdiction in this Court.

STATUTORY PROVISIONS INVOLVED

The Petition for a Writ of Certiorari accurately states that this case involves the Supremacy Clause, U.S. Const., art. VI, cl. 2. This case also involves California Public Utilities Code Section 21661.6, which provides:

> (a) Prior to the acquisition of land by any political subdivision for the purpose of expanding or enlarging an existing publicly owned airport, the acquiring entity shall submit a plan of such expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.

(b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.

(c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on such plan, and shall thereafter approve or disapprove the plan.

(d) Upon approval of the plan, the proposed acquisition of property may begin.

(e) The use of property so acquired shall thereafter conform to the approved plan, and any variance from such plan, or changes proposed therein, shall first be approved by the appropriate board of supervisors or city council after a public hearing on the subject of the variance or plan change.

(f) The requirements of this section are in addition to any other requirements of law relating to construction or expansion of airports.

STATEMENT OF THE CASE

Supplementation and clarification of Petitioner's Statement of the Case is necessary to a full understanding of the facts material to the Court's consideration of the Petition for a Writ of Certiorari ("Petition").

A. The Project at Issue: The Terminal Expansion Plan

The Burbank-Glendale-Pasadena Airport (the "Airport") is located primarily within the jurisdiction of

Respondent City of Burbank ("Burbank" or the "City"), with a small portion located in the city of Los Angeles. Petitioner Burbank-Glendale-Pasadena Airport Authority ("Airport Authority" or the "Authority") has owned and operated the Airport since 1978.[2]

The present controversy between the Airport Authority, Burbank and the State relates to the Airport Authority's plan (the "Terminal Expansion Plan") to acquire approximately 130 acres of land (known as the "B-6 Property") within Burbank on which it proposes to construct a massive new passenger terminal – one that will result in a doubling of the number of aircraft gates, a tripling of the passenger capacity, and a quadrupling of the on-site parking capacity at the Airport. Simply stated, California Public Utilities Code Section 21661.6 ("Section 21661.6"), which is set forth above, requires the approval of the City of Burbank before the Airport Authority can acquire the property designated for its Terminal Expansion Plan.

In March 1996, the Airport Authority submitted its Terminal Expansion Plan to Burbank for its review in accordance with Section 21661.6. In response thereto the City adopted procedures to review the Terminal Expansion Plan (the "Review Procedures"). Over the next

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[2] In 1976, the California Legislature amended the California Joint Powers Act, Cal. Gov't Code § 6500, *et seq.*, to include Section 6546.1, which authorized the creation of a joint powers agency specifically to own and operate the Airport. Acting pursuant to Section 6546.1, Burbank and the neighboring cities of Glendale and Pasadena, California, entered into a Joint Powers Agreement creating the Airport Authority. *Id.*

several months Burbank staff conducted an exhaustive review of the Terminal Expansion Plan and Burbank's City Council held public hearings on the Plan.

Pursuant to its review, on October 15, 1996, the Burbank City Council disapproved the Terminal Expansion Plan on the basis of numerous significant adverse impacts of the project, including:

- deterioration in police, fire, and emergency services;
- increased traffic congestion;
- deterioration in air quality and the noise environment;
- loss of buildings of potential historic significance;
- adverse effects on school-safe zones;
- interference with the removal of hazardous waste from the City's soil and water;
- the loss of over $2 million in property tax revenues; and
- the need to finance costly infrastructure improvements, including $15 million in roadway improvements.

B. The Proceedings Below

On June 11, 1996, while the Burbank City Council was reviewing the Terminal Expansion Plan submitted by the Airport Authority, the Authority filed against the City of Burbank the lawsuit in the United States District Court for the Central District of California ("District Court")

that is the subject of this Petition. The Airport Authority subsequently joined James van Loben Sels in his official capacity as Director of the California Department of Transportation as a defendant, and the State of California intervened as a defendant. The centerpiece of the Airport Authority's federal action was the claim that Section 21661.6 and Burbank's Review Procedures are preempted by federal aviation statutes and, therefore, violate the Supremacy Clause, U.S. Const., art. VI, cl. 2.[3]

On January 21, 1997, the Airport Authority moved the District Court for summary judgment. Burbank and the State filed cross-motions for summary judgment on the grounds, *inter alia*, that the Airport Authority lacked standing to bring its claims. On March 31, 1997, the District Court dismissed the Airport Authority's action, holding that as a political subdivision of the State of California, it lacked standing in federal court to sue the State and Burbank over the constitutionality of a state statute. The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirmed the dismissal on the same basis.

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[3] In addition, the Airport Authority alleged that Section 21661.6 and the Review Procedures violate the Commerce Clause, U.S. Const., art. I, § 8, and the Due Process Clause, U.S. Const., amend. XIV, § 1, and that under California law, Burbank has waived its right to enforce Section 21661.6 or otherwise is estopped from enforcing the statute against the Airport Authority.

C. The Related State Court Action

After the District Court dismissed the Airport Authority's federal case, Burbank filed an action in California Superior Court for the County of Los Angeles ("Superior Court"), styled *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, Case No. EC 022341 (the "State Court Action"). That lawsuit sought to enjoin the Airport Authority from proceeding with the acquisition of the B-6 Property without first obtaining Burbank's approval pursuant to Section 21661.6. The State intervened in the State Court Action, asserting similar claims.

On July 23, 1997, the Airport Authority filed a cross-complaint in the State Court Action, which set forth the same constitutional and state law claims that it originally brought in the District Court. The Authority's cross-complaint also alleged a new state law claim not raised in its federal action: that Burbank had, through the contract creating the Airport Authority (*see* note 2, *supra*), delegated to the Airport Authority the right to enforce Section 21661.6.[4] Thus, with the exception of the new delegation claim, the Airport Authority's cross-complaint in the State Court Action raised the identical federal constitutional claims against the identical parties (Burbank and the State) as it raised in its federal action.

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[4] Burbank requested that the Ninth Circuit take judicial notice of Burbank's complaint and the Airport Authority's cross-complaint. The Ninth Circuit granted that request. *See* Petition, App. A at A-9.

On November 18, 1997, the Superior Court ruled on the cross-motions of all of the parties for summary judgment or summary adjudication of the federal issues raised by the Airport Authority's cross-complaint, including its federal preemption claim.[5] The Superior Court granted Burbank and the State summary adjudication of the federal preemption issue, holding, *inter alia*, that Section 21661.6 constituted a legitimate exercise of the police power by the State and Burbank that is not preempted by any federal laws or regulations. The Superior Court specifically rejected the Airport Authority's claim, which it previously had made in its motion for summary judgment filed in the District Court, that *City of Burbank v. Lockheed*, 411 U.S. 624 (1973) and *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338 (9th Cir. 1992), require a finding that Section 21661.6 and the Review Procedures are preempted. The Superior Court held that Section 21661.6 properly gives local governments the right to exercise their police powers to review and approve plans for the expansion of existing airports in their communities, and found that no federal statute indicates the express or implied intent of Congress to deprive local governments of the right to control the use of land.

All of the parties subsequently filed cross-motions for summary judgment and/or summary adjudication of the state law issues presented in the case. On February 18, 1998, the Superior Court granted the Airport

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[5] A true and correct copy of the Superior Court's decision is attached as Exhibit A to Burbank's Request for Judicial Notice, filed on this date.

Authority summary judgment, holding that as a matter of *state* law, Burbank had delegated to the Airport Authority its right to enforce Section 21661.6 because the Joint Powers Agreement creating the Airport Authority authorized it to acquire property for Airport purposes.[6] Burbank and the State of California have appealed that decision.

ARGUMENT IN OPPOSITION TO PETITION

I. THE PETITION SEEKS ONLY AN ADVISORY OPINION, BECAUSE THE AIRPORT AUTHORITY HAS AVAILED ITSELF OF A STATE JUDICIAL FORUM, FULLY LITIGATED ITS SUPREMACY CLAUSE CLAIM, AND OBTAINED RELIEF FROM ENFORCEMENT OF SECTION 21661.6

A. Petitioner Seeks Review Of An Issue That Was Not Decided Below

Petitioner would have this Court believe that it is a public entity that has been deprived of a forum to adjudicate its claim that a particular state statute is preempted by federal law. Throughout its brief Petitioner frames the issue it requests this Court to review as whether a political subdivision of a state may be prevented from attacking the validity of a state statute on the basis that it violates the Supremacy Clause.[7]

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[6] A true and correct copy of the Superior Court's decision is attached as Exhibit B to Burbank's Request for Judicial Notice.

[7] *See, e.g.*, Petition at 2: "Political subdivisions – bound to follow federal law like all other entities – are thus prohibited from seeking judicial decisions on important preemption issues."

But that is not the issue that was decided below. In this instance, Petitioner, a political subdivision of the State of California, not only has a separate state judicial forum in which to adjudicate its claim that Section 21661.6 is preempted by federal law, it has actively pursued that claim in state court. Petitioner filed a cross-complaint in the State Court Action setting forth the identical preemption claim raised in its federal court action, actively pursued that claim, and lost on that issue.

The Ninth Circuit (and the District Court) found that Petitioner had no standing to maintain its Supremacy Clause claim against the State or another political subdivision thereof ***in federal court***. *See* Petition, App. A at A-2, A-3; App. B at B-8, B-10. Neither lower court held that Petitioner was deprived of any and all fora in which to pursue its preemption claim or otherwise passed on the issue of whether Petitioner could assert that claim in state court. Neither Burbank nor the State ever objected to the Airport Authority pursuing its Supremacy Clause claim in the State Court Action and, as noted above, the Airport Authority did just that through the filing of a cross-complaint.[8]

The California Supreme Court has held that political subdivisions of the state may challenge state statutes as

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[8] At no time during the State Court Action did the Airport Authority assert that the California Superior Court was an inadequate or prejudiced forum that impaired its ability to adjudicate its Supremacy Clause claim. Similarly, the Airport Authority did not avail itself of the opportunity provided under California law to transfer the State Court Action out of Los Angeles County, where the case was filed and Burbank (as well the Authority) is located. *See* Cal. Code Civ. Proc. § 394.

violative of the Supremacy Clause. *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 8 (1986). This acceptance of federal preemption claims by the courts of the State of California is perfectly permissible, notwithstanding the Ninth Circuit's conclusion that there is no standing to raise such a claim in federal court. As the Court explained in *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989), "state courts are not bound to adhere to federal standing requirements [and] they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law."

Accordingly, the Airport Authority is a wholly inappropriate party to present the issue set forth in its Petition ("[W]hether a political subdivision – even if unable to challenge state action under the Fourteenth Amendment – may maintain a constitutional challenge to state action under the Supremacy Clause"),[9] since it has a state court forum for its preemption claim and has pursued that claim to its fullest. The issue presented by the Petition simply does not reflect the actual decision of the Court below.

Given the Airport Authority's filing and prosecution of a federal preemption claim in state court, the real issue underlying the Petition is whether it may bring a Supremacy Clause claim in federal court ***notwithstanding*** the fact that there exists a state forum in which to litigate that claim. That argument, however, is not expressly set forth in the Petition, and for obvious reasons. This Court

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[9] Petition at 8.

expressly has rejected the contention that every entity "asserting a federal right is entitled to one unencumbered opportunity to litigate that right in federal district court, regardless of the legal posture in which the federal claim is raised." *Allen v. McCurry*, 449 U.S. 90, 103 (1980). Indeed, the state courts are presumed to be competent to decide federal constitutional issues. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2037 (1997). Respect for the place of the states in our federal system requires that state courts have the opportunity to incorporate federal constitutional principles into their rules of law. Accordingly, Petitioner presents to the Court an issue – whether there exists ***any*** forum for a political subdivision to adjudicate a Supremacy Clause claim – that neither was raised nor decided below.

B. Petitioner Seeks An Advisory Opinion, Because It Already Has Received Complete Relief

Given the final holding in favor of the Airport Authority in the State Court Action, any decision rendered by this Court most assuredly would be no more than an advisory opinion. The Airport Authority explains in the Petition that it filed its federal action "to secure its right to move forward" with its Terminal Expansion Plan, suggesting that the dismissal of that case somehow thwarted its efforts to do so. Petition at 5. However, Petitioner already achieved that very goal in the State Court Action. While the Airport Authority did not prevail on its federal preemption claim, it ***did*** obtain a decision that, as a matter of state law, Burbank has delegated away its Section 21661.6 approval powers to the Airport Authority. Although Respondents have appealed the

Superior Court's decision, at present neither Burbank nor the State may enforce Section 21661.6 against the Airport Authority.

Thus, even if the Court were to grant the Petition, reverse the Ninth Circuit's decision and remand the case to the District Court, there is nothing that Petitioner could accomplish by pursuing its federal case. To the contrary, given that the California Superior Court held that Section 21661.6 is inapplicable to the Airport Authority under ***state law***, federal abstention would be appropriate for a number of reasons to allow the parties to exhaust all appeals in the State Court Action. *See, e.g., Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention when resolution of unsettled question of state law may make it unnecessary for federal court to reach constitutional issue); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) (Federal courts will not decide constitutional issues affecting legislation if the record presents adequate and independent state law grounds upon which the case may be disposed.); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (abstention to avoid duplicative litigation).

As the Court recently reminded the lower federal courts, they "ought not consider the constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts" in order to avoid risking friction by attempting to construe a state statute not yet reviewed by the state's highest court. *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073 (1997). Petitioner, through its filing of a cross-complaint in the State Court Action alleging violation of the Supremacy Clause and its motion for summary judgment

in that case, has initiated just such a process.[10] Based on federalism principles and the circumstances of this case, the Court should deny the Airport Authority's request that it take up the broad, hypothetical question of when, if ever, the federal courts should become embroiled in internal disputes between states and their political subdivisions over the validity of state statutes under the Supremacy Clause.

II. THE DECISIONS OF THE COURT ARE NOT IN CONFLICT

Petitioner contends that the Court should accept review so that it can expressly overrule cases like *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), *Trenton v. New Jersey*, 262 U.S. 182 (1923), and *Williams v. Baltimore*, 289 U.S. 36 (1933), which all held that a political subdivision could not maintain a claim against a state that state legislation violates its rights on federal constitutional grounds. Petitioner argues that later decisions of the Court such as *Board of Educ. v. Allen*, 392 U.S. 236 (1968), conflict with *Hunter*, *Trenton*, and *Williams* and implicitly overruled them, causing confusion in the lower federal courts.

No such conflict exists between these cases, and the Court most certainly has not silently overruled any of them. The Ninth Circuit (and the District Court) correctly followed Supreme Court and Circuit precedent holding that a political subdivision of a state may not sue its

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[10] The Superior Court in the State Court Action was the first court ever to construe Section 21661.6.

creators in federal court to challenge the constitutionality of a state statute.

Although *Hunter*, *Trenton*, and *Williams* are not described as "standing cases" per se, they established rules of law applicable to the jurisdictional issue of whether a political subdivision of a state may sue the state to challenge the constitutionality of state law. Because a political subdivision is created by the state and can be destroyed by the state, there is no case or controversy in an action brought by a political subdivision against the state (or another political subdivision); the political subdivision cannot establish the requisite "personal stake in the outcome" of a case against the state "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". *Baker v. Carr*, 369 U.S. 186, 204 (1962).

In *Hunter*, the Court affirmed a Pennsylvania state court judgment ordering the consolidation of Pittsburgh and Allegheny pursuant to a state annexation statute. Pittsburgh challenged the consolidation, claiming that the statute violated it rights under the state and federal constitutions. The Court upheld the state court's determination that the statute did not deprive the city of property without due process in violation of the Fourteenth Amendment,[11] holding that the city did not have any due process rights vis-a-vis the state because "the state is supreme, and its legislative body, conforming its action to

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[11] The Court refused to consider portions of the state court's decision relating to the city's claims under the Pennsylvania Constitution. 207 U.S. at 176.

the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." *Id.* at 179.

Similarly, in *Trenton*, the Court reviewed a state court judgment and denied the city of Trenton's claims that a New Jersey statute violated the city's rights under the Contract Clause and deprived it of property without just compensation in violation of due process. 262 U.S. at 183. The Court held:

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.

Id. at 187 (citation omitted). *See also City of Newark v. State of New Jersey*, 262 U.S. 192, 196 (1923) (rejecting city's claim that state statute violated its rights under Equal Protection Clause because the "regulation of municipalities is a matter peculiarly within the domain of the state" and the "city cannot invoke the protection of the Fourteenth Amendment against the state."). In *Williams*, the Court also rejected a city's claim that a state statute denied it equal protection under the Fourteenth Amendment on the basis that "a municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." 289 U.S. 36, 40 (1933).

Contrary to Petitioner's assertion, *Board of Education v. Allen*, 392 U.S. 236 (1968), *Washington v. Seattle Sch.*

Dist., 458 U.S. 457 (1982), and *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), do not conflict with *Hunter, Trenton, Williams*. None of those cases expressly addressed the issue of whether a political subdivision of a state may challenge the validity of a state statute on federal constitutional grounds.

In *Allen*, the Court affirmed a New York state court judgment rejecting the claim of various school boards that a state statute violated the First and Fourteenth Amendments because it required local public school authorities to lend textbooks to students in all schools, including parochial schools. The Court specifically noted, as had the New York Court of Appeals, that members of the school boards had the requisite "personal stake in the outcome" of the litigation to establish standing on appeal because under state law they could be removed from office if they refused to comply with the statute at issue. 392 U.S. at 1925 and n.5. *Cf.* 20 N.Y.2d 109, 119 (1967). *See also Asarco*, 490 U.S. at 618 (This Court found that it had jurisdiction on appeal, even though plaintiffs would have lacked standing to file the case in federal district court, because the state court's judgment created a case or controversy.) Furthermore, individual defendants intervened to defend the statute in the state court and Supreme Court proceedings, providing further assurance that sufficient adverseness existed between the parties to ensure the adequate presentation of the constitutional issues to the courts.

In *Seattle School District*, the Court reached the merits of a federal suit brought by local school districts against the state of Washington to challenge the validity of a state statute under the Equal Protection Clause, without

addressing whether the school districts – political subdivisions of the state – had standing to bring the action. 458 U.S. at 459. Petitioner contends that the Court's exercise of jurisdiction over the case was tantamount to the *sub silentio* overruling of *Hunter* and its progeny.

That argument ignores two critical points. First, several non-governmental community organizations and the federal government intervened as plaintiffs in the suit, guaranteeing that parties on either side of the action were adverse and that a true controversy existed. *See* 458 U.S. at 464. Second, the Court's mere exercise of jurisdiction is ***not*** precedent for the existence of jurisdiction. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (the Court "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.").

Petitioner's citation to *Lead-Deadwood* is similarly unavailing. In that case, the Court reviewed a state court decision addressing a local school district's constitutional challenge to a state statute under the Supremacy Clause. The Court noted that the state court action was filed after a district court dismissed a federal suit between the same parties that had raised the identical federal preemption issue, on the basis that the federal preemption claim did not convert the challenge to state law into one arising under federal law for purposes of federal jurisdiction. 469 U.S. at n.6. Before addressing the merits, the Court stated in a footnote that the District Court's dismissal of the federal action was improper because a Supremacy Clause claim does present a federal question. *Id.* The Court did ***not*** consider or decide the issue of whether one political

subdivision has standing to sue another political subdivision over the constitutionality of a state statute under the Supremacy Clause. *Lead-Deadwood*, therefore, may not be construed as precedent that standing in federal court exists for such challenges.

III. SINCE THE COURT DENIED THE PETITION FOR A WRIT OF CERTIORARI IN *SOUTH LAKE TAHOE*, THERE HAS BEEN NO CONFLICT IN THE CIRCUITS OVER THE STANDING ISSUE

The Airport Authority suggests that the Court should grant its Petition, in part, because the Ninth Circuit's decision conflicts with the decisions of five Circuits (Third, Fourth, Fifth, Sixth and Eleventh) and with the California Supreme Court. Petition at 11-12. Petitioner also argues that the decisions of this Court are causing confusion among the Circuits. These assertions simply are incorrect.

The Ninth Circuit affirmed the dismissal of the Airport Authority's case on the basis that it was barred under the Circuit's 1980 opinion in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980), which held that as a political subdivision of the state, the city had no standing in federal court to challenge the land use ordinances and plans of another political subdivision of the state on any constitutional grounds, including the Supremacy Clause. *Id.* at 233. A petition for a writ of certiorari in *South Lake Tahoe* was denied by this Court in 1980. 449 U.S. 1039 (1980). In the eighteen years since that decision, ***no*** Circuit has revisited the question of whether

a political subdivision has standing in federal court to challenge state legislation under the Supremacy Clause, until the Ninth Circuit issued its decision in this case.

In all of the cases cited by the Airport Authority that were decided after *South Lake Tahoe*, the Circuits have found, as the Ninth Circuit did, that political subdivisions of the state did ***not*** have standing in federal court to raise constitutional claims against state defendants. In the first case cited by Petitioner, *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), the Court dismissed plaintiff's action under 42 U.S.C. § 1983 on the basis that it had no rights under the Fourteenth Amendment or Due Process Clause that it could assert against another political subdivision of the state. In *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), the federal government sued the state of Alabama, state education authorities and all state four-year institutions of higher education. The court subsequently permitted Alabama State University to realign as a plaintiff, but held that it had no standing to raise a Fourteenth Amendment claim against the state. In *Amato v. Wilentz*, 952 F.2d 742 (3d Cir. 1991), the Court determined that a County lacked third party standing to claim that the New Jersey Supreme Court Chief Justice violated a third party's First Amendment rights. The Court noted that cases such as *Williams* and *South Lake Tahoe* "reflect the general reluctance of federal courts to meddle in disputes between state governmental units." *Id.* at 755.

Contrary to Petitioner's assertion (Petition at 11-12), the Fourth Circuit in *School Board v. Baliles*, 829 F.2d 1308 (4th Cir. 1987), did ***not*** decide whether a political subdivision had standing to challenge state legislation under the

Supremacy Clause. That case did not even involve a Supremacy Clause claim. Rather, a local school board and several individual plaintiffs sued the state of Virginia under the Fourteenth Amendment to compel the state to fund remedial and compensatory programs to eliminate lingering effects of segregation. Because the individual plaintiffs did not appeal the District Court's denial of the requested relief, the Fourth Circuit first considered whether the school board had standing to appeal. The Court concluded that the board had standing only on a derivative basis, to represent the interests of white and black students. *Id.* at 1310-11. Thus, *Baliles* does ***not*** support Petitioner's assertion that that the Fourth Circuit "permit[s] political subdivisions to challenge state action under the Supremacy Clause." Petition at 11.[12]

Furthermore, Petitioner is incorrect in asserting that the Second and Tenth Circuits have not addressed what it terms the "*Hunter* rule." *See* Petition at 12-13. Both Circuits expressly have followed it, and dismissed constitutional claims brought by political subdivisions against states. *See City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973) ("the validity of this rule . . . remains controlling authority when the challenged statute is the work of a State legislature"); *Housing Auth. of Kaw Tribe of Indians v. City of Poncha City*, 952 F.2d 1183, 1188 (10th Cir. 1991), *cert. denied*, 504 U.S.

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[12] Petitioner also cited the California Supreme Court as having taken a position in conflict with that of the Ninth Circuit. Petition at 10. As noted *supra*, state courts are not bound by federal court rulings on the issue of standing in federal court. *Asarco*, 490 U.S. at 617.

912 (1992) ("It is well established that a political subdivision may not lodge constitutional complaints against its creating state.").

It is abundantly evident that since this Court's denial of the petition for a writ of certiorari in *South Lake Tahoe*, there exists no actual conflict in the decisions of various Circuits on whether a political subdivision of a state has standing in federal court to bring a Supremacy Clause claim. In none of the cases cited by Petitioner did the court rule on the issue of whether there was federal court standing to mount a federal preemption challenge to a state statute. Indeed, to the extent that any of the cases from other Circuits relied upon by Petitioner as creating a conflict among the Circuits raised that issue in *dicta*, such statements merely are evidence that the issue has not been fully considered and decided by that Circuit and, therefore, is not appropriate for consideration by this Court.

The Airport Authority is correct only in its assertion that *South Lake Tahoe* conflicts with the earlier decision of the Fifth Circuit in *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979), which was decided before this Court considered the Petition for Writ of Certiorari in *South Lake Tahoe*. In *Rogers* the court held that a school district had standing in an action against a state to claim that a state statute violated the Supremacy Clause.[13] Of course, in *Rogers* there was no parallel state

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[13] Even the *Rogers* decision did not hold that a political subdivision of a state has standing in federal court to sue the state under *every* provision of the United States Constitution. Thus, the Fifth Circuit did not reject the *Hunter* line of cases –

court proceeding in which the identical Supremacy Clause claim was being litigated between the identical parties.

This Court denied petitions for a writ of certiorari in both *Rogers* and *South Lake Tahoe*. In the intervening eighteen years, no other Circuit has decided the issue of whether a political subdivision of a state has standing in federal court to maintain a Supremacy Clause claim. There is nothing compelling about the instant case that warrants reconsideration of that issue now. To the contrary, given the state court forum already provided to and utilized by Petitioner to adjudicate its Supremacy Clause claim against Burbank and the State of California, this would be a particularly inappropriate case in which to consider the issue raised by Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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the action that the Airport Authority requests that this Court take.